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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER LEE, Superintendent of Port Authority Police,

Cross-Petitioner,

v.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Cross-Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION IN SUPPORT OF CROSS-RESPONDENTS

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BRIEF AMICUS CURIAE OF FREE CONGRESS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THIS CASE[1]

Amicus curiae, the Free Congress Research & Education Foundation, is a non-partisan, non-profit public policy research institute formed in 1977. It is dedicated to advancing traditional values through, among other activities,

[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

(i) education and research on issues of legal and social policy, state policy (including the initiative and referendum process), fiscal responsibility, and institutional reform, and (ii) training in conservative governance and coalition leadership, both in the United States and throughout eastern Europe and the new independent states.

Amicus strongly supports free speech, religious liberty, and free enterprise. Amicus strongly opposes restrictions on speech upon public property such as major airports, and believes that the free exchange of ideas is crucial to effective democratic government and to the betterment of individuals, families, and society.[2]

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[2]Amicus participates in the case to oppose the Port Authority's restrictions on speech upon public property and to promote the free exchange of ideas. Amicus and its counsel are not affiliated with ISKCON in any way, do not endorse ISKCON's religious beliefs in any way, and in fact find ISKCON's religious beliefs distasteful. However, the freedom of speech of all citizens and of ISKCON stand and fall together. As this Court has said,

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641-42 (1943).

SUMMARY OF ARGUMENT

The Second Circuit incorrectly held that the municipal airports in this case are not public fora and that the Port Authority may ban charitable solicitation in the public areas of those airports. (The Second Circuit correctly held that the Port Authority could not ban literature distribution.) The Port Authority's ban of literature distribution and charitable solicitation contravenes a foundational principle of the first amendment: "that the ultimate good desired is better reached by free trade in ideas [and] that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Justice Holmes's well-known and oft-cited formulation is based on the political and economic philosophy of Milton, Locke, the framers, and J.S. Mill, and wonderfully captures the essence of free speech.

This "marketplace of ideas" should be governed by the same limited-government principles that work best in the market for goods and services. Just as free economic markets perform better than regulated economies, the marketplace of ideas is most likely to produce truth (or at least the best solution to any given problem) with less government interference and more citizen input. Government simply is not competent to control either ideas or economic markets.

Just as government intrusion distorts economic markets, the Port Authority has distorted the marketplace of ideas in this case by attempting to close part of that market. Unfortunately, the Port Authority has chosen to close a mar-

ket/forum that is most accessible to the non-powerful, leaving them at a severe government-imposed disadvantage in the marketplace. ISKCON's alternative fora, if any, are less available (because more expensive) and are less effective.

Finally, both aspects of ISKCON's activities in the New York airports are protected under the first amendment. Literature distribution and charitable solicitation often occur together (often out of economic necessity). The many previous cases decided by this Court reflect that reality and make no distinction between the two activities, but protect them together. The same should be true here.

INTRODUCTION

The economic marketplace works best when it is not distorted by government control and regulation. *The same is true of the "marketplace of ideas,"* and that is a central message of the first amendment's free speech clause.[3]

This nation has applied economic free market principles more consistently than any other, with the result that our nation's standard of living and ability and willingness to

[3]The marketplace of ideas rationale does not extend to obscenity and erotic materials, which are more characterized by nonideational action than speech. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 61, 70-71 (1976) (plurality opinion) (pornographic expression "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"). *Accord*, FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978); California v. LaRue, 409 U.S. 109, 118 (1972)

help others have been unrivalled for decades. In light of the interconnection of economic liberty and liberty of expression, it is not surprising that this nation also has applied free speech principles more consistently than any other, with the result that our nation's enduring political stability is unrivalled.

The recent collapse of the communist economies simultaneous with the collapse of the communist governments exemplifies the intertwining of economic freedom and freedom of speech. Unprecedented measures of both economic freedom and freedom of speech have come to the former Soviet Union. While it may not be possible to say which freedom came first, it is clear that they came together (and assisted each other's emergence).

In light of this history in our nation and, recently and dramatically, in our world, the Port Authority's effort to exclude ISKCON from the public fora under its control is an anomaly. (It may very well be that the Soviet republics now allow more freedom for literature distribution and charitable solicitation in airports than does the Port Authority.) More to the point for this Court, the Port Authority's policy is an unconstitutional interference with the "marketplace of ideas" protected by the first amendment.

ARGUMENT

I. THE SEARCH FOR TRUTH IN THE "MARKETPLACE OF IDEAS" IS A PRIMARY JUSTIFICATION FOR THE FREEDOM OF SPEECH.

A. The Philosophers Who Influenced the Framing and Interpretation of the First Amendment Emphasized the Great Value of Permitting Free Expression of Competing Ideas.

1. Milton and Locke

"Any examination of the First Amendment . . . requires a preliminary overview of the British tradition." Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition,* 95 Yale L.J. 857, 876 & n.71 (1986). That tradition includes John Milton's argument in 1643 that the search for truth is best accomplished by competition between ideas rather than by government fiat.

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter.

Aeropagitica, A Speech for the Liberty of Unlicensed Printing 227 (C. Eliot ed. 1937).

Following Milton, John Locke further developed what has become known as "classic marketplace theory." Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 Duke L.J. 1, 6 & n.21. Locke argued that truth is discovered through competition with falsehood and that any authoritatively imposed truth is plagued with the danger of error. J. Locke, *A Letter Concerning Toleration,* in *The Second Treatise of Government (An Essay Concerning the True Origin, Extent and End of Civil Government) and A Letter Concerning Toleration* 125, 139-43 (J. Gough ed. 1966). For Locke, "truth still stood apart, above, to be striven for." Cole, 95 Yale

L.J. at 877. In Locke's words, "let truth have fair play in the world . . . [and] men the liberty to search after it." *An Essay Concerning Human Understanding,* in *The Tradition of Freedom* 285 (M. Mayer ed. 1957).

2. The Framers of the First Amendment

The framers of the first amendment, like John Locke and armed with his philosophy, were convinced of the danger of error in governmentally decreed truth. That conviction led directly to the first amendment's protection of expression.

> From this pervasive state of ignorance, our liberal forefathers deduced three imperatives: (1) No coercion of conscience of one by the other (out of respect for the responsibility of each); (2) *liberty of speech* for everyone so that all may inquire, argue, and persuade; and (3) the development of institutions that nourish practical cooperation in practical activities, without requiring prior agreement about final ends or personal motivations.

M. Novak, *Free Persons and the Common Good* 93 (1989) (emphasis added).

The framers were also convinced that Milton was correct about the outcome of the competition between truth and falsehood: "truth is great and will prevail if left to herself." Act for Establishing Religious Freedom, 12 Hening's Laws of Virginia 84 (1786) (drafted by Thomas Jefferson and proposed by James Madison).

3. John Stuart Mill

J.S. Mill wrote after the framing of the constitution but before this Court considered any cases under the first amendment. His essay, *On Liberty*, expanded on Milton's and Locke's concept of the competition of ideas and has been ech-

oed in this Court's decisions since the turn of the century. *See* T. Emerson, *Toward a General Theory of the First Amendment* 3 n.1 (1967) (Mill's *On Liberty* is one of the "major sources in the development of the theory" of free speech).

Mill argued that government control of speech interferes with the ability to seek truth,[4] and he justified free speech in part because of the aggregate benefits to society, not merely to the individual speaker.

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.

J. Mill, *On Liberty of Thought and Discussion*, in *Utilitarianism, Liberty, and Representative Government*, at 24.[5] Courts that invoke the marketplace model of

[4] *See* Ingber, 1989 Duke L.J. at 6:

> [F]irst, if the censored opinion contains truth, its silencing will lessen the chance of our disovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled.

[5] Though Mill is often portrayed as anarchically libertarian, that may not be the case.

> [H]owever libertarian the formal application of Mill's principles, his was a highly moralistic libertarianism. . . . The arguments he . . . present[s] are too steeped in a moralistic rationalism to allow the conclusions of our contemporary liberals to be drawn from them with any firmness.

Canavan, *J.S. Mill on Freedom of Expression*, Modern Age, Fall 1979, at 362, 368, 369.

> Mill's defense of the regime of free speech . . . was informed not by an undifferentiated libertarianism but by a vision of the progressive enlightened development of a society. . . . Mill's thinking is not adequately reflected by focusing . . . on a mere absence of restraint. The end is social progress through individual character development.

Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 Sup. Ct. Rev. 158.

In any event, the Court correctly has rejected extreme extensions of Mill's argument for liberty in general, such as an extension to obscenity. *E.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.14 (1973) (obscenity not protected); California v. LaRue, 409 U.S. 109, 118 (1972) (nonobscene dance on periphery of Constitution).

the first amendment also justify free speech because of its aggregate benefits, and thereby echo Mill. Ingber, 1984 Duke L.J. at 4.

B. This Court Has Relied on the Marketplace of Ideas Rationale More than Any Other.

1. The Earliest Judicial Descriptions of the Marketplace: Justice Holmes

In 1919, Justice Holmes crystallized the political theory of Milton, Locke, the framers, and Mill in one phrase: "free trade in ideas."

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by

> free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).[6] Holmes' rationale of "free trade in ideas" has been described as the classic case for free speech.[7] *E.g.*, Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 675 (1960).

2. Subsequent Applications by the Court

The search for truth in the marketplace of ideas has been the Court's dominant justification for free speech. *See*

[6]*See* Coase, 6 J. Legal Studies at 1 ("A statement such as this displays an extreme faith in the efficiency of competitive markets and a profound distrust of government regulation.").

[7]Some commentators have pointed out that not everyone agrees that objective truth exists, and have therefore questioned whether the metaphor of a search for truth in the marketplace of ideas retains vitality. *See* Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 965, 974 (1978). Whether or not the end product of the marketplace of ideas is objective truth, however, the process nevertheless yields the best results in an imperfect world. *See* Cole, 95 Yale L.J. at 891 ("[Even i]f we can know the truth only by popular approximation, . . . our concern in protecting speech should not be with truth itself but with the process and results of popular deliberation, i.e., democracy.") *Accord* Ingber, 1984 Duke L.J. at 15 & n.69.

Francione, *Experimentation and the Marketplace Theory of the First Amendment,* 136 U. Pa. L. Rev. 417, 422 & n.13 (1987) ("The marketplace model of the first amendment . . . is the generally accepted judicial choice among first amendment theories."); Baker, *Scope of the First Amendment Freedom of Speech,* 25 UCLA L. Rev. 964, 973 (1978) ("[T]he market theory dominates"). *See also* Chaffee, *Free Speech in the United States* 33 (1967); T. Emerson, *Toward a General Theory of the First Amendment* 3 (1966) ("Maintenance of a system of free expression is necessary . . . as a means of attaining the truth"); G. Gunther, *Constitutional Law* 977 (11th ed. 1985) (Holmes's marketplace rationale for free speech is "among the best known articulations" of first amendment values); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 863-64 (2d ed. 1983) (the development of marketplace theory from John Milton, through J.S. Mill, to Holmes is the "initial justification for a system of free speech"); L. Tribe, *American Constitutional Law* § 12-1 (1978) (the marketplace theory is the "most familiar theory of free speech"); Greenawalt, *Free Speech Justifications,* 89 Colum. L. Rev. 119, 130 (1989) ("The most familiar argument for freedom of speech is that speech promotes the discovery of truth."); Stone, *Content Regulation and the First Amendment,* 25 Wm. & Mary L. Rev. 189, 193 (1983) ("search for truth").[8]

[8]*See also* Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1, 27 (1977) ("The rationale of the First Amendment is that only if an idea is subject to competition

The Court has on occasion cited Mill directly regarding the competition of ideas. *E.g., Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94, 189 n.25 (1973) (Brennan & Marshall, JJ., dissenting); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 392 n.18 (1969); *New York Times v. Sullivan,* 376 U.S. 254, 272 n.13, 279 n.19 (1964); *Poe v. Ullman,* 367 U.S. 497, 514-15 (1961) (Douglas, J. dissenting); *Barenblatt v. United States,* 360 U.S. 109, 151 n.22 (1959) (Black & Douglas, JJ., and Warren, C.J., dissenting).

The Court has relied on the marketplace of ideas rationale in many cases,[9] including the following: *Texas v. Johnson,* 491 U.S. 397, 417 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole . . . will go unquestioned in the marketplace of ideas."); *Shapero v. Bar Association,* 486 U.S. 466, 481 (1988) (quoting Holmes and referring to "the constitutional fence around this metaphorical marketplace of ideas"); *Hustler Magazine v. Falwell,* 485 U.S. 46, 50, 52 (1988) ("False statements of fact are particularly valueless: they interfere with the truth-seeking function of the marketplace of ideas."); *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) ("unfettered interchange of ideas") (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969) ("the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee"); *Martin v. City of Struthers,* 319 U.S. 141, 143 (1943) ("The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.").[10]

[9]As of early 1986, the Court had made 33 references to the "marketplace of ideas" since the first use of that phrase by Justice Brennan in Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (concurring opinion), and had made 14 references to Holmes's phrase "free trade in ideas" since 1925. Cole, 95 Yale L.J. at 894 n.160. Since 1986, the Court has referred to the "marketplace of ideas" an additional three times and to the "free trade in ideas" twice. *See* Texas v. Johnson, 491 U.S. 397, 417 (1989) ("marketplace of ideas"); Shapero v. Bar Association, 486 U.S. 466, 481 (1988) ("marketplace of ideas" and "free trade in ideas"); Hustler Magazine v. Falwell, 485 U.S. 46, 50, 52 (1988) ("marketplace of ideas" and "free trade in ideas").

[10]*See also Dennis v. United States,* 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) ("When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.")

II. THE MARKETPLACE OF IDEAS JUSTIFICATION IS A NATURAL COROLLARY TO THIS COUNTRY'S FREE MARKET ECONOMIC SYSTEM.

A. Free Markets in Economics Produce the Best Results.

The collapse of communist and socialist economies elsewhere in the world has provided additional evidence for the conclusion that most economists had already reached: though not perfect, competition in a free market optimizes production, allocation, and overall utility. As Ingber notes, "Economists have praised the laissez-faire economic model as facilitating optimal production and allocation of goods."[11] 1984 Duke L.J. at 5 n.14 (citing M. Friedman & R. Friedman, *Free To Choose* 1-13 (1980); A. Marshall, *Principles of Economics* 63-70 (8th ed. 1950); A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (7th ed. London 1793) (1st ed. London 1776); D. Ricardo, *Principles of Political Economy and Taxation,* in *The Works of David Ricardo* 1 (J. McCulloch new ed. 1888); Evans & Body, *Introduction* to *Freedom and Stability in the World Economy* 1-2 (D. Evans & R. Body eds. 1976); Furubotn, *Worker Alienation and the Structure of the Firm,* in *Governmental Controls and the Free Market* 195, 216-17 (S. Pejovich ed. 1976); Simon, *The Crucial Issue Is Freedom,* in *Dilemmas Facing the Nation* 1 (H. Prochnow ed. 1979). *See also* Director, 7 J.L. & Econ. at 8 ("The short period of [free market] liberalism has been accompanied by as much material progress as took place in all prior times."); Friedman, *Free Markets and Free Speech,* 10 Harv. J.L. & Pub. Pol'y 1, 7 (1987) ("A free society . . . is a more productive society than any other; it releases the energies of people, enables resources to be used more effectively, and enables people to have a better life."); Ingber, 1984 Duke L.J. at 16 & n.72 ("A free economic market, arguably, values goods and services and allocates resources in a manner that maximizes utility.") (citing K. George & J. Shorey, *The Allocation of Resources* 31 (1978); F. Knight, *The Economic Organization* 32-35 (1951); P. Samuelson, *Economics* 38-42 (11th ed. 1980); H. Simons, *Economic Policy for a Free Society* 46-47 (1948)).

[11] Director provides a working definition of "laissez-faire" that applies equally to the market for goods and the market for ideas: "Laissez-faire has never been more than a slogan in defense of the proposition that *every extension of state activity should be examined under a presumption of error.*" Director, *The Parity of the Economic Market Place,* 7 J. L. & Econ. 1, 2 (1964) (emphasis added).

B. The First Amendment's Marketplace of Ideas is Directly Analogous to Free Markets in Economics.

The marketplace of ideas metaphor has had such power and significance (from Milton, through Locke, through Mill, through Holmes, and to the present) because economic freedom and freedom of speech are in fact interconnected.

> There is a direct connection between free markets on the one hand and free speech on the other. That is part of the story of free markets making free men. Interferences with markets constitute and produce interferences with free speech.

Friedman, 10 Harv. J.L. & Pub. Pol'y, at 3. Thus, there are no examples "of a society that repressed the economic liberties of the individual while being solicitous of his other liberties." I. Kristol, *Two Cheers for Capitalism* xi (1978), quoted in H. Schlossberg, *Idols for Destruction* 120 (1983). *See generally* Coase, *Advertising and Free Speech,* 6 J. Legal Studies 1, 1-5 (1977); Coase, *The Market for Goods and the Market for Ideas,* 64 Am. Econ. Rev. Papers & Proceedings 384 (1974);[12] Director,7 J. L. & Econ. at 3-6.

R.H. Coase explains why the two markets are analogous:

> I do not believe that [a] distinction between the market for goods and the market for ideas is valid. There is no fundamental difference between these two markets and, in deciding on public policy with regard to them, we need to take into account the same considerations. In all markets, producers have some reasons for being honest and some for being dishonest; consumers have some information but are not fully informed or even able to digest the information they have; regulators commonly wish to do a good job, and though often incompetent and subject to the influence of special interests, they act like this because, like all of us, they are human beings whose strongest motives are not the highest.
>
> . . . My argument is that we should use the same *approach* for all markets when deciding on public policy.

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[12]Coase's articles argue that the same level of skepticism of government competence to regulate markets applies both to the marketplace of ideas and to the economic market. 6 J. Legal Studies at 4; 64 Am. Econ. Rev. Papers & Proceedings at 386, 389.

64 Am. Econ. Rev. Papers & Proceedings at 389. *See also id.* at 390 (advocating "a more consistent view"); Coase, 6 J. Legal Studies at 14 ("It seems to me that the arguments which Emerson uses to support freedom in the market for ideas are equally applicable in the market for goods.").

Director agrees: "[T]here is a remarkable similarity between the underlying basis for complete laissez faire in the market for ideas and the market for economic goods and services." 7 J. L. & Econ. at 3. *See also id.* at 6 (any "dichotomy" between the two markets "is a mistaken one").

In fact, the concept of a free marketplace for ideas preceded its economic counterpart.

> The free market as a desirable method of organizing the intellectual life of the community was urged long before it was advocated as a desirable method of organizing its economic life. The advantage of free exchange of ideas was recognized before that of the voluntary exchange of goods and services in competitive markets.

Director, 7 J.L. & Econ. at 3. Novak emphasizes this in explaining the origins of the metaphor:

> But before this problem arose in economics, it arose with regard to liberty of conscience. To deal with liberty of conscience, the first liberals were driven to a metaphor rooted in village experience: "a marketplace of ideas." Anyone could enter a marketplace; anyone could "sell" or "buy"; anyone could stroll through only to look and listen. In short, a market was a place in which practically everyone entered, a place without coercion, normally a place peaceful, bustling, and lawlike. As the first liberals did not fully trust human intellect (because of their basic maxim of ignorance), so also did they trust it. That is, intellect is never complete, instantaneous, and full; on the other hand, in most persons it is active, reasonably fair, and

> questing. The ignorance of human beings is such that no man should be entrusted with power over the unalienable responsibilities of others. But it is also such that most persons, most of the time (not always), are honest enough inquirers to acquit their own responsibilities. The first principle makes a marketplace of ideas necessary. The second principle makes it work able.

M. Novak, *Free Persons and the Common Good* at 94-5.

Justice Holmes himself shows the concatenation of free enterprise and free speech. While he is often assumed to have been an economic liberal because of his regular affirmance of social welfare legislation, he personally subscribed to free enterprise beliefs. He deprecated "the tendency common to the time to believe in regulating everything--against which I am as prejudiced as you. . . . Many of our friends seem to believe they can regulate bliss."[13] He "never read a socialist yet from Karl Marx down, and I have read a number, that I didn't think talked drool."[14]

III. THE MARKETPLACE OF IDEAS CONCEPTION OF THE FREEDOM OF SPEECH REQUIRES ALLOWING LITERATURE DISTRIBUTION AND

[13] *Holmes-Laski Letters 1916-1935* at 49 (M.Howe ed. 1953). Holmes believed in the right of "winning in the competition of the market." O. Holmes, *Collected Legal Papers* 281 (1920). *Accord, id.* at 280, 293-94; *Justice O.W. Holmes* 197 (H.Shriver ed. 1936); *Holmes-Laski Letters 1916-1935, supra* at 945, 87.

[14] *Holmes-Laski Letters 1916-1935, supra* at 96. *Accord, id.* at 84, 845, 942; 1 *Holmes-Pollock Letters 1874-1932* at 175-76, 124 (M.Howe ed. 1941).

CHARITABLE SOLICITATION IN A MUNICIPAL AIRPORT FORUM.

A. Government Is Not Competent To Control the Marketplace of Ideas, Just as It Is Not Competent To Control Economic Markets.

1. With Ideas, as With Economics, Citizens Know Better than Government what Information They Need To Receive and To Disseminate.

As Justice Scalia recognized recently in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 694 (1988) (concurring opinion), "our traditional understanding, embodied in the First Amendment, [is] that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the Government is wise or impartial enough to make the judgment for them."

Skepticism about government competence in economics dates at least to 1776 and Adam Smith.

> What is the species of domestic industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could be safely trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.

A. Smith, *An Inquiry into the Nature and Causes of the*

Wealth of Nations 456 (R. Campbell, A. Skinner, W. Todd ed. 1979) (reprint ed. 1981).

Government control of ideas presents the same competence problems as government control of markets.

> Free speech issues can be viewed in terms of allocation of institutional competence. In strictly pragmatic terms, the history of official determination of truth has been noted especially for its errors.

Ingber, 1984 Duke L.J. at 7 n.26.[15]

Thus, the marketplace of ideas metaphor is particularly apt.

> The market metaphor introduced by Holmes' "free trade in ideas" concept invokes a laissez-faire conception of the role of government in the regulation of speech. Grounded . . . on the "imperfect knowledge" of participants and overseers alike . . . [h]is "free trade in ideas" concept captures these British theories in a peculiarly American metaphor, suggesting the ideal of the small business economy--free, self-interested participation by individuals and a laissez-faire role for government."

Cole, 95 Yale L.J. at 886.

2. Government Distorts the Marketplace of Ideas When It Closes Forums, and Particularly Low-Cost Avenues of Expression, Such as the Airport Here.

a. Airports and Other Public Fora Are the Most Ac-

[15]Coase is blunt about government incompetence in the marketplace of ideas:

> The government, if it attempted to regulate, would be inefficient and its motives would, in general, be bad, so that even if it were successful in achieving what it wanted to accomplish, the results would be undesirable.

Coase, 64 Am. Econ. Rev. Papers & Proceedings at 384. *See also* Coase, 6 J. Legal Studies at 1.

cessible to the Non-Powerful, and Must Be Kept Available as Public Fora.[16]

In both location and function, large municipal airports are the modern equivalent of ancient city gates. Every prior court of appeals to consider the question concluded that municipal airports are equivalent to streets, parks, and other traditional public fora.[17]

[16]This access argument is specifically limited to *public* property. It has no application to private property, such as shopping centers or malls. The Court quite correctly does not recognize a first amendment right of expression on the premises of privately owned shopping centers. Hudgens v. NLRB, 424 U.S. 507, 519-21 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Court recognizes a first amendment right "to engage in speech activities on private property contrary to the wishes of the owner . . . only if such property consists of a company town or other entity which performs 'the full spectrum of municipal powers and [stands] in the shoes of the State.'" M. Nimmer, *Nimmer of Freedom of Speech* § 4.09[D] at 4-114 (1984) (quoting Lloyd Corp., 407 U.S. at 569). The Court has authorized states under their own constitutions to offer more expansive rights. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). However, it has been suggested that the Court's subsequent takings clause cases have made it doubtful that state constitutional rights such as those found in PruneYard can continue to be upheld. Note *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?,* 64 Wash. L. Rev. 133 (1989).

[17]*See* Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied,* 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds,* 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975).

In part because they are public fora, municipal airports are accessible to speakers who may not have effective access to any other platform. In this modern world, only "two methods exist for communicating nonsanctioned views to the public: the mass communication media for those with access, and the public forum for those without such media access." Ingber, 1984 Duke L.J. at 37. Thus, the same streets, parks, and other similar places that "have immemorially been held in trust for the use of the public," *Hague v. CIO,* 307 U.S. 496, 515 (1939), often are the only fora of any type accessible to many citizens.

> These alternative forums for public communication [streets, parks, and open places] enable dissenting or low status individuals and groups to disseminate their views even when they cannot gain access to mass media.

Ingber, 1984 Duke L.J. at 41. *See also id.* at 5 (recognizing the existence of "access limitations suffered by disfavored or impoverished groups").

Professor Kalven recognized the unique value of public places as public fora when this Court had just begun its public forum analysis:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 12.

Justice Kennedy reiterated the same concern in the Court's most recent public forum decision:

> As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.

United States v. Kokinda, 110 S. Ct. 3115, 3125 (1990) (concurring opinion).

This Court's cases repeatedly have stressed the economic need for access to public fora. *E.g., Martin,* 319 U.S. at 146 ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *Murdock v. Pennsylvania,* 319 U.S. 105, 112 (1943) ("Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy [by a license tax on colporteurs]. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.").[18]

b. The Government Cannot Divert Speakers to Alternative Fora Because the Alternatives Are Not as Effective And Do Not Reach the Same Audience.

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[18]This is not to say that government has any affirmative obligation to remove access limitations that it has not erected, but only that government should not impose additional access limitations on the only forums to which disfavored or impoverished groups still have access. The government violates free speech (and other) rights when it attempts to act as a "leveler" of society, attempting to impose equality of results rather than merely ensuring equality of opportunity. *Buckley,* 424 U.S. at 17 (portions of FECA unconstitutional; provisions "aimed in part at equalizing the relative ability of all voters to affect electoral outcomes" necessarily involved "suppressing communication"). *See also* Novak, *Free Persons and the Common Good* at 97 ("Liberals [referring to early or classical liberals] were not often levellers.").

That alternative fora may be available to a given speaker cannot justify excluding that speaker altogether from the forum in question.

> [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State, 308 U.S. 141, 163 (1939).

> Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly . . . ." Free expression "must not, in the guise of regulation, be abridged or denied."

Grayned v. City of Rockford, 408 U.S. 104, 117 (1972) (quoting *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968), and *Hague v. CIO*, 307 U.S. 496, 516 (1939)). For example, in *Heffron v. International Society for Krishna Consiousness*, 452 U.S. 640 (1981), charitable solicitation and literature distribution could legitimately be confined to a fixed location within the fairgrounds, but could not be excluded from the fairgrounds altogether. *Id.* at 655.

Nor does the Court simply accept without examination the government's assertion that alternative fora are available. Alternative fora may be available theoretically, but not realistically.

> [T]he Court expressly should evaluate the feasibility of the proposed alternatives. The Court should require that a given speaker have available realistic alternatives to disseminate *effectively his* particular message.

> . . . The fact that the media may only be used at great expense, and in contrast to traditional forums, has recognized power to exercise prior restraint on what it will disseminate, would seem to mandate greater, rather than lesser, protection of the traditionally low cost open forums, if for no other reason than to preserve a situs for voices otherwise lost in the wilderness.

Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny*, 37 Hastings L.J. 439, 481, 486 (1986) (original emphasis). Furthermore, access to more than one forum may be more of a necessity than a luxury.

> We seldom recognize the enormous importance of *diversified* sources of financial and economic support in making it possible for a "nut" to have his say. . . . [T]oday's nut may be tomorrow's prophet. The essence of free speech is to preserve the opportunity for nuts to turn into prophets.

Friedman, *The Economics of Free Speech*, in *The Essence of Friedman* 9, 10 (K. Leube ed. 1987) (emphasis added).

c. Distortion Results from Closing Accessible Public Fora Such as Airports.

The marketplace of ideas, like the economic marketplace, operates best when the government does not suppress information or, worse, close portions of the marketplace altogether.

> The suppression of relevant information in the political market [and in the marketplace of ideas in general], as in the market for (ordinary) goods and services, may distort choice and in that way reduce welfare. . . .
>
> . . . There will be less experimentation if the financial rewards are systematically reduced because of suppression. . . . New ideas may never get a hearing.
>
> . . . [T]he loss of information from a refusal to

> provide public forums[] is slight *unless* the government goes so far as to forbid the use of its streets, sidewalks, and parks [and airports].

Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U.L. Rev. 1, 11, 24, 52 (1986) (emphasis added).

In this case, the Port Authority's threatened closure of a unique and critical portion of the marketplace of ideas will necessarily distort the overall marketplace.

B. Both Literature Distribution and Solicitation Are Protected Speech.

1. Distribution Is Protected.

As this Court has previously held, "the oral and written dissemination of the Krishnas' religious views and doctrines is protected by the First Amendment." *Heffron*, 452 U.S. at 647 (citing *Schneider v. State*, 308 U.S. 147, 160, 162-164 (1939), and *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)). *See also Martin*, 319 U.S. 141; *Largent v. Texas*, 318 U.S. 418 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943). *Accord Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

2. Solicitation Is Also Protected.

a. Solicitation Is Speech.

"Solicitation is a recognized form of speech protected by the First Amendment." *Kokinda*, 110 S. Ct. at 3119 (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980), and *Riley*, 487 U.S. at 788-89). *See also Riley*, 487 U.S. at 693 (Scalia, J., concurring) ("We have held the solicitation of money by charities to be fully protected as the dissemination of ideas.").

In *Heffron*, 452 U.S. at 647, the Court emphasized that the first amendment protects solicitation as well as literature distribution:

> Nor does [the state] claim that this protection is lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith. Our cases indicate as much. *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The Court has more than once expounded the following reasons that solicitation is protected speech:

> "[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease."
>
> . . . "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes--that are within the protection of the First Amendment."

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797-98 (1985) (quoting *Schaumburg*, 444 U.S. at 632).

b. Freedom To Solicit Is Necessary to the Freedom To Disseminate.

Charitable solicitation is both an economic and a constitutional necessity.

> We seldom recognize the enormous importance of diversified sources of financial and economic support in making it possible for a "nut" to have his say. . . . [T]oday's nut may be tomorrow's prophet. The essence of free speech is to preserve the opportunity for nuts to turn into prophets.

Friedman, *The Economics of Free Speech*, at 10.

That explains the Court's recognition in Cornelius that literature distribution is not possible without solicitation, and that solicitation must therefore be protected. "[W]ithout solicitation the flow of such information and advocacy would likely cease." *Cornelius*, 473 U.S. at 798 (quoting *Schaumburg*, 444 U.S. at 632). "[W]ithout the funds obtained from solicitation in various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized." *Cornelius*, 473 U.S. at 799.[19]

c. Solicitation May Be More Time Consuming for the Audience, but It Is Also a More Effective Mode of Communication.

As the Court recognized in *Cornelius*, "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available in [written solicitation]." 473 U.S. at 798. In-person advocacy, including solicitation, should therefore be no less protected than silent literature distribution.

> The audience's experience in a face-to-face encounter is more imposing than when it passively reads about or

[19] *Cf. Lovell*, 303 U.S. at 452 ("Liberty of circulating is as essential to [the freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value.").

> listens to a viewpoint. The interchange is more flexible, more of the senses are engaged, and the audience's response, whether negative or positive, is likely to be more pronounced.

Ingber, 1984 Duke L.J. at 41.

d. Solicitation in the Airport Is Analogous to Door-to-Door Solicitation, which the Court Has Recognized Is Entitled to Special Solicitude Because It Is Inexpensive.

Door-to-door solicitation is often used by individuals and groups whose messages have not attracted large amounts of funding, because door-to-door solicitation is inexpensive. For those individuals and groups, without door-to-door solicitation "the flow of [much] information and advocacy would likely cease." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *See also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812-13 n.30 (1984) ("the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry").[20]

[20] The Court went on to note that "this solicitude has practical boundaries," quoting Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) ("That more people may be more easily and cheaply reached by sound trucks . . ., is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

Here, ISKCON does not seek to use sound trucks or anything remotely similar, and no easy means of publicity are open in the airport forum under the Port Authority's rules.

CONCLUSION

The market for goods and the marketplace of ideas should both be free of government interference. That interference distorts and defeats the optimum results the markets would otherwise achieve if they were controlled only by the producers and consumers, who best know their own needs and interests. The Port Authority's attempt to close a portion of the marketplace of ideas in this case violates the first amendment's embodiment of free market principles.

For the foregoing reasons, amicus respectfully urges this Court to affirm in part and to reverse in part the judgment of the U.S. Court of Appeals for the Second Circuit in this case.

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Respectfully submitted.

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